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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 38.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,
v.
MARY [redacted] DONNELLY HENAGAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Court of Appeals is reported at 272 F. 2d 153.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 27, 1959. The petition was filed February 15, 1960, and was granted May 2, 1960 (R. 175). The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254 (1).

Questions Presented.

1. Whether the Court of Appeals has correctly interpreted the decisions of this Court in cases arising under the Federal Employers' Liability Act (45 U.S.C. Sec. 51) as establishing (*a*) that the plaintiff no longer has the burden of persuasion in actions for negligence, (*b*) that only the barest possibility of causation is enough to make out a case for the jury, and (*c*) that only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner and running down the suicide was enough to take the case to the jury.

2. Whether a separate appeal must be taken from an order denying a motion for new trial seasonably filed after judgment, or whether the appeal from the judgment is sufficient to bring before the Court of Appeals the question of law raised by the denial of the motion.

Statutes and Rules Involved.

The statutory provision involved is 45 U.S.C. Sec. 51. The rules involved are the Rules of Civil Procedure for the United States District Courts, Rules 50(b), 54(a), 58, 59(a), 59(b) and 73(a). The statute and the pertinent provisions of these rules are printed in Appendix A attached hereto.

Statement.

On October 11, 1954, the respondent was employed by the petitioner as a grill-car attendant on a regularly sched-

uled passenger train *en route* from Boston, Massachusetts, to New York City. As the train was entering the station at Providence, Rhode Island, the engineer made an emergency application of the brakes when a Mrs. Montell stepped from the station platform to the track in the path of the locomotive in what appeared to be an attempt to commit suicide (R. 34). It is claimed that the respondent was injured and later became insane as a result of the emergency stop of the train. The train in question consisted of two Diesel locomotives and eight cars (R. 21). The engineer testified that approximately 2 miles before the train reached Providence he had made an application of the brakes to slow down for some curves. At approximately three-quarters of a mile east of the station he made a further application of the brakes preparatory to making the regular stop at the Providence Station (R. 39). The train had gradually slowed to a speed of 13 to 15 miles per hour as it was coming into the Providence Station. The track from the east is on a right-hand curve and the station platform at the easterly end is partly on the curve. The platform is approximately 20 feet wide and, except at the extreme easterly and westerly ends, is covered by a canopy supported by posts on the center of the platform (Exhibits 1 and 2A-2F, R. 139-153). The distance between the rails of the track on which the train was approaching was 4 feet 8½ inches, and the distance between the right-hand rail and the station platform was about 2 feet. On the opposite side of the track was a picket fence located about 2 feet beyond the left-hand rail (R. 11). The engine was of the type which had a cab extending across the front part a few feet back from the extreme front end (Exhibit 3, R. 151). The engineer had a seat on the right side of the cab and the fireman sat on the left (R. 44). There was a windshield-type window across the front of the cab. As the

train proceeded the engineer noticed there were people on the platform waiting for the train, most of whom appeared to be toward the westerly end of the platform (R. 37). Between the posts which supported the canopy in the center of the platform there were some baggage trucks and ice trucks at various intervals (R. 14, 42, 107, 113). As the train proceeded along the track adjacent to that portion of the platform covered by the canopy the engineer noticed a woman stepping across the rail nearest the platform. When he first noticed her she was facing the fence. She then took another step forward toward the second rail and turned and faced the engine and stooped or knelt down (R. 33). The engineer estimated the distance between her and the locomotive when he saw her stepping across the first rail as between 30 and 40 feet (R. 36). When she took the step forward and stooped in front of the engine the engineer immediately applied his brake in emergency in an effort to avoid running over her (R. 34). The fireman testified that he saw the woman stepping over the first rail and that there was not even time for him to shout to the engineer before the brakes were applied (R. 120). Other witnesses, who were on the station platform, testified as to the conduct of this woman who stepped on the track in front of the train. Edward Brewster testified that he was standing on the platform near the fifth post from the kiosk and that a woman came up and asked about the time of the train. She then turned and walked about 20 feet east. He looked east again as the train was coming in and saw the woman on the tracks bent over, but he did not see her go onto the track (R. 108). Miss Dupere testified that she was standing about 6 feet from the stairway and saw the train coming around the bend, and saw the woman step off the platform and start to walk onto the track. The woman was already off the platform when she first saw her and was crouching as she walked to the second rail (R. 110).

Miss Bowen testified that she was standing three posts from the stairwell, saw the train approaching and noticed a woman near the fifth post put her coat on the baggage rack and step out slowly in front of the engine. She did not think the train was more than 5 feet away when she stepped onto the track (R. 113-114). James Meegan testified that he was walking along the platform from west to east and saw the woman take her coat off and put it on an ice truck as she stepped out onto the track. In his opinion the train was then 35 to 40 feet away. She walked toward the far rail and half turned toward the train, when she started to stoop. It looked as though she tried to put her head on the rail (R. 116-117).

The result of putting on the emergency brake was to cause the train to come to an abrupt stop within about 80 feet instead of the gradual stop which would have been made several hundred feet beyond the point of the accident if the emergency had not occurred (R. 39). There was testimony that when the brakes were applied the respondent was thrown against the counter but was not thrown off her feet by the sudden stop of the train (R. 59). She, however, immediately became hysterical and complained of pain in her head, and was taken back to Boston on another train (R. 50). None of the physicians or specialists who examined her according to the records felt that she had a physical injury of any consequence. There was no evidence of brain damage (R. 103). At the time of trial the respondent had developed a reaction of guilt as if she had been the cause of the death of the woman. This was called a hysterical conversion reaction by the respondent's medical expert, who also testified that this reaction was based upon a paranoid psychosis that must have existed prior to this reaction (R. 104-105).

At the close of all the evidence the petitioner presented a motion for a directed verdict, which was denied condi-

tionally by the Court (R. 133), and thereafter the jury returned a verdict in favor of respondent on January 7, 1959. Judgment was entered forthwith on the same date. Thereafter petitioner filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial (R. 132). These motions were denied after hearing on the 13th day of January, 1959 (R. 133). At the hearing the trial judge made endorsements on the motions and stated the reasons for his denial of the several motions as follows (R. 133-134):

> "I am denying both motions. On the Defendant's Motion for Directed Verdict I have endorsed this: This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was "denied" but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its verdict this Judge would grant the motion were he free so to do. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959."
>
> "On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'
>
> "I wish to be a little more explicit than I am in these endorsements. In my opinion there was no evidence whatsoever of negligence on the part of the engineer.

I cannot read the record as a whole in a way to find any evidence of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not.

"With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954. In my opinion every medical practitioner of any competence would say that the kind of condition which the plaintiff now has owes its origin to factors far antecedent to the 11th of October. It may be that what happened on the 11th of October acted as a trigger, but in my view not as a legal cause. It seems to me to be as irrelevant from the point of view of causation as if on that day the rain suddenly started to dash against the windows and the plaintiff became frightened. There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

Petitioner filed notice of appeal from the judgment on February 11, 1959. The Court of Appeals in its opinion (272 F. (2d) 153, 156) noted that petitioner did not appeal from the denial of its motions for judgment notwithstand-

ing the verdict and for a new trial. The Court thereupon treated the appeal from the judgment as raising only the question of sufficiency of the evidence raised by the petitioner's motion for a directed verdict. The Court, after holding that its interpretation of recent opinions of this Court required submitting the case to the jury, ended its opinion as follows:

> "The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial." (R. 175.)

Summary of Argument.

I.

The Court of Appeals misconstrued and misapplied the opinions of this Court as establishing (*a*) that the plaintiff no longer has the burden of persuasion in actions for negligence; (*b*) that only the barest possibility of causation is enough to make out a case for the jury; and (*c*) that only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner and running down the suicide was enough to take the case to the jury.

The Court rejected the theory of negligence, advanced by the respondent, that the engineer could have seen the woman on the track in time to avoid running her down without an emergency application of the brakes, but, "with an eye to the trend indicated by recent decisions of the Supreme Court," held that there was a scintilla of evidence of negligence toward the suicide in failing to apply the

brakes immediately rather than after a momentary hesitation and that there was the faintest scintilla of evidence to suggest a causal relation between the engineer's possible negligent failure to apply the brakes sooner than he did and the running down of the suicide. The petitioner submits that the conclusions reached by the Court misconstrued the applicable opinions of this Court setting forth governing principles defining burden of proof and evidence sufficient to make out a question of negligence and causation for the jury. The Court interpreted the ruling in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, as the equivalent of the standard under which a plaintiff may recover if he adduced only the faintest scintilla of evidence on the issues of negligence and causation. To say that negligence need be only slight is not the equivalent of saying that the evidence necessary to prove that negligence need be only the faintest scintilla. See *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479. The more recent decision of *Inman* v. *Baltimore & Ohio Railroad Co.*, 361 U.S. 138, demonstrates that plaintiffs still have the burden of persuasion in actions for negligence under the Act. See also *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576.

Assuming that the Court of Appeals did make use of the test formulated in *Rogers* v. *Missouri Pacific Railroad Co.*, *supra*, in determining the sufficiency of the evidence to take the case to the jury, petitioner submits that it nevertheless improperly applied that test to the facts of the case before it. The Court properly rejected the contention that the train could have been stopped without an emergency application at any time after the suicide was seen or was in position to have been seen in the path of the locomotive. If baggage trucks on the platform obstructed the view of the engineer, they were an obstruction to the view of the platform where the woman would have been in a position of safety. If he had noticed her immediately before she

started to step off, she would still have been in a position of safety on the platform. It was only when she started to go onto the track that he noticed her as distinguished from other people waiting for the train. There was no evidence that the train was more than 40 feet from her when she was in a position to be seen moving onto a place of danger, that is, onto the track. The only scintilla of evidence of negligence suggested by the Court of Appeals is the failure of the engineer to attempt to bring his train to an emergency stop when he first noticed her stepping over the first rail when the engine was 40 feet away, rather than waiting until he saw her take another step forward and kneel or stoop.

Petitioner submits that, whether the engineer had applied his brakes 40 feet from the suicide or 12 feet from her, the result of the stopping would have been the same, both as to the suicide and as to the respondent. It is the fact that the train stopped suddenly and unexpectedly that is the basis of the respondent's action. The distance the train was from the suicide when the brake was applied had no causal relation to respondent's injuries. The petitioner submits that the facts of the case at bar are entirely similar to those in *Herdman* v. *Pennsylvania Railroad Co.*, 352 U.S. 518 (1957). Petitioner submits that on the facts of the case at bar there was not any substantial evidence or even a scintilla of evidence of negligence on the part of the petitioner that caused or directly contributed in any degree to cause the injury to the respondent and that the Court of Appeals clearly erred in sustaining the Court below.

II.

The respondent's appeal from the judgment of the District Court was sufficient to bring before the Court of

Appeals the question of law raised by the denial of the petitioner's motion for a new trial. The petitioner filed a motion for new trial in the alternative with its motion for judgment notwithstanding the verdict. This was in effect a separate motion and raised different issues. *Marsh* v. *Illinois Cent. R. Co.*, 175 F. (2d) 498. The trial judge denied the motion, not as an exercise of discretion, but on the ground that the Court construed the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. This amounted to a ruling of law and not an exercise of discretion. *Garrison* v. *United States*, 62 F. (2d) 441 (4 Cir. 1932); *Magee* v. *General Motors Corp.*, 213 F. (2d) 899 (3 Cir. 1954).

The Court of Appeals declined to consider the question raised by the denial of the motion for a new trial for the reason that "the defendant did not appeal from the denial of its motion for a new trial." The petitioner submits that the appeal from the judgment was all that was required to bring before the Court the issues raised by these post-judgment motions. The rule established by the First Circuit in the case at bar is contrary to the rule established by this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). It is also contrary to the rule established in other circuits. See *DiGiovanni* v. *DiGiovannantonio*, 233 F. (2d) 26 (C.A. D.C. 1956). It is even contrary to earlier opinions in the First Circuit. *Sears* v. *Pauly*, 261 F. (2d) 304, 307 (1 Cir. 1958). The petitioner submits that the rule established in the case at bar requires that separate appeals be taken from any post-judgment motion and that in formulating this rule the Court was in error.

Argument.

I.

THE COURT OF APPEALS MISCONSTRUED AND MISAPPLIED THE OPINIONS OF THIS COURT AS ESTABLISHING (*a*) THAT THE PLAINTIFF NO LONGER HAS THE BURDEN OF PERSUASION IN ACTIONS FOR NEGLIGENCE; (*b*) THAT ONLY THE BAREST POSSIBILITY OF CAUSATION IS ENOUGH TO MAKE OUT A CASE FOR THE JURY; AND (*c*) THAT ONLY THE FAINTEST SCINTILLA OF EVIDENCE TO SUGGEST THE INFERENCE OF ANY CAUSAL CONNECTION BETWEEN THE ENGINEER'S POSSIBLY NEGLIGENT FAILURE TO APPLY THE BRAKES SOONER AND RUNNING DOWN THE SUICIDE WAS ENOUGH TO TAKE THE CASE TO THE JURY.

The Court of Appeals, "with an eye to the trend indicated by recent decisions of the Supreme Court" (R. 17), affirmed the ruling of the trial judge. That Court, although rejecting the theory of negligence advanced by the respondent, upheld the Court below and indicated that by the faintest scintilla of evidence the jury might have found negligence toward the woman on the track, not because the engineer could have seen her in time to stop without an emergency application of the brakes, but because he hesitated momentarily in applying the brake when he did see her. And although the Court could discern only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possible negligent failure to apply the brakes sooner than he did, and the running down of the suicide, it felt, as it read recent decisions of the Supreme Court, that the plaintiff had shown enough to take her case to the jury.

The petitioner submits that in reaching these conclusions the Court of Appeals has misconstrued and misapplied applicable opinions of this Court setting forth the governing principles defining proof which requires submission to the jury of both questions of negligence and

causation in cases arising under the Federal Employers' Liability Act.

Despite occasional reference in dissenting opinions of this Court to the contrary, the Court has never held that the proper test to be applied as to the sufficiency of evidence to warrant submitting a case to the jury, *i.e.*, "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (*Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 506, 507), was in effect the equivalent of a standard under which the plaintiff may recover if he adduced only the faintest scintilla of evidence on the issue of causation. To say that negligence need be only slight is not the equivalent of saying that the evidence necessary to prove that negligence need be only the faintest scintilla. See in this respect *Brady* v. *Southern Railway Co.*, 320 U.S. 476, where the Court said at page 479: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury."

In the more recent decision of *Inman* v. *Baltimore & Ohio Railroad Co.*, 361 U.S. 138; 4 L. ed. (2d) 198, 1959, the Court, in applying the test of *Rogers* v. *Missouri Pacific Railroad Co.*, *supra*, to the facts of the case before it, demonstrated that the correct norm for decision did not, as the Court of Appeals claims, permit an abandonment of the rule that plaintiffs have the burden of persuasion in actions for negligence under the Act. Thus, at page 140 of its decision, the Court said: "The burden of proving that the crossing was an unsafe place to work was on petitioner." In addition the Court also uses language in the decision which militates against its acceptance as a proper rule of decision the rule that the faintest scintilla of evi-

dence of negligence or causation is enough to take the case to the jury. Illustrative of this point are the following excerpts from the decision:

> "In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury.
>
> . . . . . .
>
> "In making the judicial appraisal of this tenuous proof, Ohio's Court of Appeals held it not sufficient. It found that there was 'no evidence of prior occurrences of the kind here under consideration' in the record. Indeed, unless these 11 words can be said with reason to be sufficient, there is none. Under such circumstances, they are too slender a reed for us to say that the decision of Ohio's court is erroneous."

See also *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576, where the Court says:

> "The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged."

Thus the petitioner submits that the Court of Appeals erroneously construed the decisions of this Court in holding that the tests enunciated by it in determining the sufficiency of the evidence were tantamount to a requirement that only the barest possibility of causation be present to make out a case for the jury, and that the plaintiff is relieved of its traditional burden of proof in suits for negligence under the Federal Employers' Liability Act.

It cannot be argued that the various expressions of the Court of Appeals in its opinion, such as "barest possibility of causation," "faintest scintilla of evidence," etc., are just dicta in terms of attempted paraphrases of the proper test and that as such they did not enter into the decision, since in its opinion the Court expressly states (R. 173) that it "can discern from the engineer's testimony [the testimony upon which it relies exclusively to supply evidence of negligence and causation] only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, . . ."

Assuming that the Court of Appeals did make use of the test formulated in *Rogers* v. *Missouri Pacific Railroad Co., supra,* in determining the sufficiency of the evidence to take the case to the jury, the petitioner submits that nevertheless it improperly applied that test to the facts of the case before it.

The respondent alleged in her complaint that the petitioner negligently caused the train to come to a sudden and unexpected stop, causing injuries to her (R. 3-4). It has consistently been the respondent's contention that the engineer could or should have seen the woman on the track in time to bring his train to a gradual stop before reaching her, without the necessity of any emergency application of the brakes, and that the sudden stop of the train could have been avoided (R. 124, 172). Any contention that the emergency application might have been avoided if the woman had been seen by the engineer before she left the platform is without any factual support. Also the fact that the engineer testified that baggage trucks on the platform may have obstructed his view of the platform is not a fact that could have any causal relation to this accident. If the engineer had seen the woman sooner than he did, she

would have been on the platform in a safe position, presumably a passenger waiting to take the train. There was no unusual situation in the operation of the train or in the presence of the persons on the platform until Mrs. Montell left the safety of the platform and placed her body within the path of the train. While she was on the platform, even though she was standing close to the edge, she was still in a position of safety and the engineer would have had no reason to believe that she would deliberately step in front of the engine. The evidence does not warrant a finding that any truck obstructed the view of the portion of the platform on which the woman necessarily must have been standing just before she stepped onto the tracks and at the time she stepped onto the tracks. The testimony of witnesses who saw her is all to the effect that her leaving the platform and stepping onto the track was one continuous movement (R. 110-113, 117). It must be borne in mind that both the time and the distances were very short. The woman would have taken, at most, one step from the place of safety on the platform to the place of danger on the tracks, and it was while she was taking this step or a second step that the engineer first noticed her. The distance from the edge of the platform to the far rail was less than 7 feet. In going from the platform toward the farthest rail the woman would not have taken more than three normal steps from the time she left the safety of the platform until she assumed a crouching position between the rails in front of the locomotive. There was not a bit of evidence to support an argument that from the time the woman was first in any position of danger the train could have been stopped without an emergency application of the brakes.

The Court of Appeals properly rejected respondent's contention that the train could have been stopped without an emergency application, nor does it appear that the trial judge found any factual basis for this contention, since he

clearly stated that upon the record he could find no negligence on the part of the engineer.

The only scintilla of evidence of negligence suggested by the Court of Appeals is the failure of the engineer to attempt to bring his train to an emergency stop immediately upon seeing the suicide on the track 40 feet away rather than waiting, as the Court reasons he must have done, until he was within about 12 feet from her. It is submitted that in the time necessary for the engineer to react to the situation which suddenly confronted him, with the train traveling at a speed of 20 feet per second, the train would have traveled the distance it did before a brake application could reasonably be expected to be made. The Court below seems to indicate that the duty owed to the suicide required the engineer to make a sudden stop in an attempt to avoid running over her as soon as he saw her stepping onto the track. The negligence relied on by the respondent in her complaint is "negligently operating said train causing it to come to a sudden and unexpected stop." These are two bases of negligence arising out of two conflicting duties to two different persons. It is difficult to see any causal relation between the momentary hesitation on the part of the engineer, if that may be considered negligence toward the suicide, and the negligence relied on by the respondent in her complaint.

Whether the engineer had applied his brakes 40 feet from the suicide or 12 feet from her, the result of the stopping would have been the same both as to the suicide and as to the respondent. It is the fact that the train stopped suddenly and unexpectedly that is the basis of the respondent's action, and the distance the engine was from the suicide when the brakes were applied has no causal relation to the respondent's injuries.

The stopping of the train was sudden and unexpected, but that was not negligence toward the respondent in the

circumstances of this case. *Herdman* v. *Pennsylvania Railroad Co.*, 352 U.S. 518 (1957).

The defendant submits that the situation in the case at bar is entirely similar to that in the case just cited. That case involved an injury to a conductor riding in a caboose when the engineer brought the train to a sudden stop to avoid striking a motor vehicle at a grade crossing. The trial judge had directed a verdict for the defendant and the Court of Appeals affirmed (228 F. (2d) 902). This Court also affirmed, stating at page 520:

> "We agree with the lower courts that the jury question of negligence was not presented by the proofs."

The defendant submits that on the authority of the *Herdman* case the trial judge could have and should have allowed the defendant's motion for a directed verdict and its motion for a judgment notwithstanding the verdict.

If it be argued that in the *Herdman* case the doctrine of *res ipsa loquitur* was relied upon, the petitioner submits that the method of proof relied on in that case to prove negligence does not alter either the facts or the legal principles of negligence involved. There, as in the case at bar, the circumstances of the sudden stop fully appear. The burden which the plaintiff had to sustain was proof of negligence, and the Court held that that burden had not been sustained.

On the facts accepted by the Court of Appeals as the established facts of the case the conclusion cannot be reasonably drawn that negligence on the part of the railroad played any part, ever so slight, in the injury of the plaintiff below. From a reading of the opinion it is clear that the Court recognizes as established the fact that, "when the suicide stepped off the platform onto the track," "the

front of the locomotive was not more than 40 feet away." The Court also appears to accept as established that an emergency application of the brakes could not bring the train to a stop in less than 80 feet.* Yet on this state of the record the Court comes to the incredible conclusion that the jury might have found that an application of the brakes when the engineer first saw the suicide on the tracks, *i.e.*, 40 feet from the Diesel, somehow might have brought the train to a stop soon enough to avoid hitting the woman. It is inescapable that the Court arrives at this conclusion, albeit by a somewhat circuitous route. Thus from its consideration of the evidence the Court states that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone. To support this statement, the Court finds evidence of negligence in that it could be inferred from the engineer's testimony that he did not apply the brakes as soon as he should have. The Court admits that "The engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her" (R. 174). To supply that lack, however, the Court states that it can discern from the engineer's testimony a scintilla of evidence, even though it be the faintest, to suggest the inference of a causal connection between the engineer's failure to apply the brakes sooner than he did and running down the suicide. When it comes to actually demonstrating what that scintilla is, the Court never does set forth a possible factual hypothesis on which the engi-

*The Court of Appeals does not treat as negligence in and of itself the emergency application of the brakes.

neer could have avoided running over the woman, but takes refuge in "recent decisions of the Supreme Court." Thus it appears that, if there is a scintilla of evidence in this case, it is a scintilla supplied by the so-called recent trend of Supreme Court decisions, not by the facts of the case.

It might be argued that implicit in the Court's decision on the facts is a rejection of the engineer's testimony as to the distance which it would take the train to stop upon an emergency application of the brakes. Thus, if the train could be stopped in an emergency in 20 feet, 30 feet, or in any distance short of 40 feet, then, in the light of the other undisputed evidence, it would indeed be proper to say that there was a causal connection between the failure to apply the brakes sooner and the running over of the suicide. The only difficulty is that there is no evidence in the record on the distance required for an emergency stop other than that supplied by the engineer's testimony. So, if that testimony is rejected, then there is a complete lack of evidence on this point and for the jury to make a finding it would have to indulge in conjecture. As the Court stated in *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576, ". . . disbelief of the engineer's testimony would not supply a want of proof." Thus the only credible evidence is that the train could not be stopped in less than 80 feet. Indeed, the following language in the Court of Appeals decision seems to demonstrate that the Court is committed without qualification to acceptance of that fact. "It is true that no eye witness to the tragedy, and there were several, placed the front of the locomotive more than 40 feet away, about half the distance in which the *train could possibly be stopped*, when the suicide stepped off the platform onto the track" (R. 173-174). (Emphasis supplied.) On the state of the facts accepted by the Court of Appeals we might ask ourselves, in the words of Justice Whittaker in his concurring opinion in *Inman* v. *Baltimore & Ohio Rail-*

road Co., cited, *supra*, "how could [the petitioner] have prevented the casualty?"

The petitioner submits that on the facts of this case there was not any substantial evidence, or even a scintilla of evidence, of negligence on the part of the petitioner that caused or directly contributed in any degree to cause the injury of the plaintiff below. Consequently the Court of Appeals clearly erred in deciding the case.

II.

THE APPEAL FROM THE JUDGMENT WAS SUFFICIENT TO BRING BEFORE THE COURT OF APPEALS THE QUESTION OF LAW RAISED BY THE DENIAL OF THE PETITIONER'S MOTION FOR A NEW TRIAL.

The petitioner filed a motion for a new trial in the alternative with its motion for judgment notwithstanding the verdict. This was in effect a separate motion and raised different issues. *Marsh* v. *Illinois Cent. R. Co.*, 175 F. (2d) 498. The trial judge denied this motion, not as an exercise of discretion, but on the express ground "that this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion" (R. 133). This amounted to a ruling of law that the trial judge lacked the power to allow the motion in the exercise of his discretion. The issue, therefore, before the Court of Appeals was not one of abuse of discretion, but rather the power of the trial judge to exercise his discretion to set aside the verdict and grant a new trial. *Garrison* v. *United States*, 62 F. (2d) 441, 442 (4 Cir. 1932). *Magee* v. *General Motors Corp.*, 213 F. (2d) 899 (3 Cir. 1954).

In the case last cited the trial judge had denied a motion for a new trial for reasons similar to those given by the

trial judge in the case at bar. The Court of Appeals said (p. 900):

> "While this was the proper standard to apply to the disposition of the motion for judgment notwithstanding the verdict, its application to the new trial motion amounted to an abdication of the judge's functions with respect to that motion. The case must go back to the district court for reconsideration of the motion for a new trial in the light of the court's view of the weight of the evidence and all other relevant factors. Among these would obviously be the views of the trial judge expressed at the time the verdict was rendered."

The Court of Appeals in the case at bar, however, took the position that the question relating to the denial of the motion for a new trial was not before it, "for the defendant did not appeal from the denial of its motion for a new trial" (R. 175). The jury returned a verdict on January 7, 1959. Judgment was entered forthwith in accordance with Rule 58. The motion for new trial was filed January 12 and was denied January 13. The defendant thereafter seasonably appealed from the judgment (R. 135). The point was relied on by the appellant on appeal (R. 166). Was it also necessary for it to file a second appeal from the order on the motion to carry the question of law raised by the order to the Court of Appeals? The ruling of the Court of Appeals appears to indicate that a separate appeal from any post-judgment order is now required in the First Circuit.

This practice is contrary to that prescribed by the Supreme Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). There the Court said (p. 253) that an appeal would lie, ". . . not from his order denying a new trial, for that order, save in most exceptional circum-

stances, is not appealable, but from the judgment entered on the verdict, for errors of law committed on the trial."

The practice now required in the First Circuit also appears to be in conflict with that in other circuits.

The exact situation as in the case at bar was involved in *DiGiovanni* v. *DiGiovannantorio*, 233 F. (2d) 26 (C.A. D.C. 1956). There the Court said (p. 28):

> "It is argued that Gabriel did not appeal from the denial of a new trial, since the notice of appeal ran literally only from the order of March 10, 1955 granting the letters of administration. We think the argument cannot be sustained. The motion was filed within 10 days of the entry of judgment; it was clearly a motion under Rule 59 of the Federal Rules of Civil Procedure, 28 U.S.C.A., and was part of the same proceeding which produced the judgment from which Gabriel appeals. Until that motion was disposed of, the judgment lacked the finality requisite for appeal. Thus the order denying the motion for a new trial is a ruling that produced and is included within the final judgment and on appeal from that judgment properly brings the order before the reviewing Court."

The following cases show that the same practice as that in the District of Columbia is followed in other circuits:

Green v. *Reading Co.*, 180 F. (2d) 149, 150 (3 Cir. 1949).

Texas & New Orleans R.R. Co. v. *C. A. Underhill*, 234 F. (2d) 620, 623 (5 Cir. 1956).

Ford Motor Co. v. *Busam Motor Sales, Inc.*, 185 F. (2d) 531, 533 (6 Cir. 1950).

Bass v. *B. & O. Terminal R. Co.*, 142 F. (2d) 779, 780 (7 Cir. 1944).

Buder v. *Fiske*, 174 F. (2d) 260, 265 (8 Cir. 1949).
Agostino v. *Ellamar Packing Co., Inc.*, 191 F. (2d) 576, 577 (9 Cir. 1951).
Marshall's U.S. Auto Supply Co. v. *Cashman*, 111 F. (2d) 140, 141 (10 Cir. 1940).

Until the decision in the instant case the First Circuit, while permitting appeals from orders on motions for new trials in certain unusual circumstances (*Aberlin* v. *Zisman*, 244 F. (2d) 620 (1 Cir. 1957)), had recognized that the proper method of appealing from such orders was by an appeal from the judgment.

Sears v. *Pauly*, 261 F. (2d) 304, 307 (1 Cir. 1958).

It appears that, in order to permit appeals in cases where the appellant had lost the right to appeal from the judgment (*Aberlin* v. *Zisman*, *supra*) or had mistaken its remedy (*United States* v. *Best*, 212 F. (2d) 743, 744, footnote (1 Cir. 1954); *Creedon* v. *Loring*, 249 F. (2d) 714, 717 (1 Cir. 1957)), the Court had permitted appeals from the post-judgment orders as the "final decision" in the case. The following significant language appears in the footnote to the *Best* case: "Strictly, we think, the appeal should have been taken from the original judgment of June 10, 1953, not from the order denying the motion for rehearing."

The case of *Peterman* v. *Indian Motorcycle Co.*, 216 F. (2d) 289 (1 Cir. 1954), may point the way to the result in the Court below in the instant case, but it is significant that the Court in *Sears* v. *Pauly*, *supra*, referred to that case as giving a choice between appealing from the judgment itself and the order denying the motion, and held that an appeal from the judgment in the *Pauly* case was properly taken.

It now seems clear that what started as an exception to the general rule in permitting appeals in hardship cases from the post-judgment motions has become the rule in the First Circuit. Those appeals, at first permissive, have now become mandatory. The practice of appealing from the judgment is no longer a simple method of protecting a litigant's rights, but has become a trap for the unwary.

Conclusion.

The petitioner respectfully requests that this Court reverse the judgment entered in the Court of Appeals and order judgment for the petitioner, or, in the alternative, if this Court rules that a question was presented for the jury, the petitioner requests that the Court reverse the judgment below and remand the case for further proceedings upon the petitioner's motion for a new trial.

NOEL W. DEERING,
Counsel for the Petitioner.

ARTHUR D. HEALEY,
DAVID W. WALSH,
Of Counsel.

Appendix A.

UNITED STATES CODE (1952 EDITION).

45 U.S.C. Sec. 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Rule 50. Motion for a Directed Verdict:

. . . . . .

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 54. Judgments; Costs:

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Rule 58. Entry of Judgment:

Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; . . . The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 59. New Trials; Amendment of Judgments:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

Rule 73. Appeal to a Court of Appeals:

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under

Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.